Star LAW*review*

JUVENILE COURTS IN BANGLADESH

A gap between statute and practice

PHOTO: AP

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IN the last two consecutive issues I had glimpsed over the development of the concept of juvenile justice and a judicial debate over the determination of the age of the child brought before the court. I would like to take some important issues up in this piece, which cause the juvenile court non-functioning. It is noticed that lack of knowledge about rights of the child among the police, lawyers, court officers and even judges are the causes behind the slow pace of the proper administration of the juvenile justice. Though our higher judiciary, it is worth mentioning, is highly sensitised on the issue of child rights (except few cases) the situation of the subordinate judiciary is not up to the mark. Often the trial of juvenile appears at stake in the hands of the lower judicial functionaries.

Lack of juvenile courts

Lack of juvenile courts hinders extremely the proper administration of juvenile justice. At present there are only three juvenile courts working in Bangladesh. It is worth mentioning that Section 4 of the Children Act, 1974 empowers the High Court Division, Court of Sessions Judge, Court of Additional Sessions Judge, Court of Assistant Sessions Judge and the Magistrate first class to exercise the jurisdiction of the juvenile court. But besides regular functions these courts have little leisure to give a sympathetic look at the children brought before them. Resultantly working as a juvenile court becomes their optional work and the trial of the juvenile is conducted frequently in the regular court.

Lack of knowledge about juvenile justice and child rights

It is found that the Public Prosecutors have little knowledge that trial of a child should take place in a different court where the treatment of the juvenile would be appropriate. Often they do not know of the formation, procedures and the very objectives of the juvenile trial. On the other hand though the judges are supposed to possess a significant knowledge about juvenile justice and child rights they try to avoid it due to huge pressure of disposing of a lot of cases in a day. They find little opportunity to form a separate court for the juvenile. Having heard hundred cases in a day a judge must be too exhausted to show any kind of extra skill and care in discharging his judicial duties for a child's case.

Study shows that most of the magistrates have no legal education particularly on juvenile justice that precludes them to apply the special judicial approach when a child is brought before them. They are unaware of the special law like Children Act 1974 to deal with child offenders. This lack of knowledge leads them to follow the Code of Criminal Procedure 1898 instead of Children Act.

The police are part and parcel of juvenile justice system. But the irony of fact is that police are working without having least training and orientation on how to deal with a child offender. They only know that children shall be treated differently. That's why they rather try to avoid them which result in making them adult in the charge sheet. Lack of police personnel, lack of transport facilities, and lack of interest in the service also lead them to do so. Since a case is not disposed of in a day the investigation officer will have to be present every trial day before the court which, according to police, is a burden upon them. Resultantly police show least interest to protect children while they come into conflict with laws.

Lack of motivation to protect child rights

In an adversarial judicial administration situation like ours lawyers always try to win by no means his/her case. Lack of knowledge about child rights makes them unenthusiastic to protect the child or to give a sympathetic look towards the child in trial. Moreover, the patriarchal attitude leads our lawyers to humiliate a female child victim during cross-examination. For example, when a rape victim comes to the court the opposite lawyer asks her to say loudly in the open court that she has been raped. It is customary that the opposite party has to hear the allegation of the complainant from his/her own mouth. Moreover, lawyers as well as the court officers often allegedly humiliate the female child victim in the court. It is told that the court express least sympathy towards the child accused in order to maintain impartiality.

Juvenile trial

It is noteworthy that only the accused children are getting the advantage of the trial by the juvenile court. The Children Act 1974 provides that the juvenile courts will try all cases in which a child is charged with commission of an offence. The preamble of the Act also reveals that this Act is to "consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders." On the other hand section 2 (d) defines youth offender as the 'child who has been found to have committed an offence.' Therefore, the child who is victim of an offence is being deprived of the benefit of the juvenile trial. For example, if a female child is raped by an adult the victim is not getting the benefit of the juvenile court. Since the perpetrator is an adult the trial will have been taken place in the regular court or in the special tribunal. It is mentionable that one of the objectives of the juvenile justice is to keep the children out of the regular criminal proceedings, i.e. framing charge, examination, cross-examination. A victim child has to go through these proceedings in the regular criminal trial.

Absence of separate investigation cell

There is no separate investigation cell (police) to investigate the offence allegedly committed by a child, and giving charge sheet etc. Children are also not getting special care and treatment from law enforcing agency specially trained about child rights. It is seen that the police-citizen ratio is very poor and they have hardly enough time to take special care of the children. There are only 1,17,000 police personnel in Bangladesh. They have many duties to discharge. Seldom an adequate number of them can have the chance of attending the child offenders.

Concluding remarks

I would like to offer a host of recommendations instead of bringing a formal conclusion. Firstly, special training programme for the public prosecutors, lawyers, judges, court officers and police should be arranged in order to make them sensitised on the issue of juvenile justice as well as child rights. Secondly, as soon as possible separate juvenile courts need to be established in every district. Thirdly, special award for protection of child rights will make the concerned authority more enthusiastic to give special attention towards the children. And lastly, the issue of child rights and juvenile justice should be incorporated as one of the components in the training manual of the police, judges, lawyers, court officers and other concerned officials dealing with children.

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FACT*file*

UN's Darfur envoy arrives in Sudan to help spur peace negotiations

The United Nations envoy tasked with re-energizing the peace process in the violence-wracked Darfur region has arrived in Sudan for fresh talks on how to kick-start political negotiations between the parties to the conflict.

Jan Eliasson, the Secretary-General's Special Envoy for Darfur, met the African Union-UN Joint Mediation Support Team (JMST) in the Sudanese capital, Khartoum, to discuss preparations for the joint international meeting in Libya on the Darfur political process.

That meeting, to be held in Tripoli on 15-16 July, has been convened to assess the progress over the past months towards holding peace talks in Darfur, where more than 200,000 people have been killed and at least 2 million others displaced from their homes amid brutal fighting since 2003.

The meeting will focus on the roadmap, the joint plan of the UN and the AU -- whose Darfur envoy, Salim Ahmed Salim, is also expected to arrive in Khartoum this weekend -- to solve the conflict between the Government, allied Janjaweed militias and Darfur's many rebel groups. Peace negotiations between the warring parties mark the third phase of the roadmap.

Mr. Eliasson left Khartoum today for the West Darfur provincial capital of El Geneina for talks with political parties, civil society groups, representatives of internally displaced persons (IDPs) and local authorities involved in the Darfur-Darfur Dialogue and Consultation process.

In a related development, the new AU-UN Joint Special Representative for Darfur was scheduled to travel to Khartoum today to begin his new assignment. Rodolphe Adada will serve as head of the existing AU Mission in Sudan (AMIS) until the planned hybrid AU-UN peacekeeping force takes over. He will then head that operation.

Source: UN News Service.

HUMAN RIGHTS *analysis*

Fallacy of generation-based human rights
South African experience

SHAH MD. MUSHFIQUR RAHMAN

HUMAN rights are often categorised into some broad divisions. These are -- civil and political rights on the one hand and socio-economic and cultural rights on the other. Our Constitution framers placed the civil and political rights in Part III of the Constitution under the title 'Fundamental Rights' and opted to put economic, social and cultural rights in Part II of the Constitution under the title 'Fundamental Principles of State Policy'. But what is the difference between 'Fundamental Rights' and 'Fundamental Principles'? A black-letter lawyer's answer would be prompt and outright, "fundamental rights are enforceable by law and conversely, fundamental principles are not." Does that speak it all or there is more to it than mere enforceability as the only differentiating factor? First, let us consider the rationale behind this classification of rights.

This grouping of rights into separate categories is not quite unique to Bangladesh Constitution. Other constitutions of different jurisdictions also resorted to this method with subtle variations in the titles of categories. This classification of human rights was inspired by the theory of generation-based rights.

This idea of generation-based human rights is credited to Czech jurist Karel Vasak. He formally placed this concept before the international community in 1979 at the International Institute of Human rights in Strasbourg. His basic idea was to divide human rights into three generations.

The first-generation human rights basically contain civil and political rights like -- freedom of association, right to movement, freedom of speech, right to vote, freedom of religion, right to fair trial etc. These rights are also called 'negative rights' in the sense that government need not do anything for realisation of these rights. All government needs to do is to abstain from interfering with exercise of these rights by the citizens.

On the other hand, second-generation human rights are mostly social, economic and cultural in nature. These include rights like -- right to food, clothing, health care, shelter, employment, social security etc. These are also known as 'positive rights' in that government has to do something affirmative to get these to people or help people achieve these.

The third-generation human rights are more progressive than the former categories so as to include rights like -- right to healthy environment, right to development, right to self-determination etc.

It was once believed that socio-economic rights would be within reach in the course of time if civil and political rights could be materialised to a reasonable degree. In other words, civil and political rights are of enabling character, exercise of which will facilitate the achievement of secondary kind of rights i.e. rights of socio-economic character. But practical scenarios of economically weaker countries disprove this widely professed 'chain reaction' of rights. Exercise of first-generation rights for several generations failed to bring the second-generation rights within peoples' accessibility in these countries. With the development of this understanding, the concept of grouping human rights into different generations started loosing its weight, substantially.

Now progressive jurists agree that human rights are to be seen in totality. One set of rights could prove of little use if other set remains unaddressed or underemphasised. Say for example, if a child is not provided with one vital social right i.e. right to education, he is unlikely to get a well-paid job on reaching his adulthood and here right to equal treatment of law (alleged to be a first generation right) would be of no avail for him.

In absence of socio-economic rights, full realisation of civil and political rights is not possible and the vice-versa. So both sets of rights complement each other as they are mutually enabling in nature. And the strongest argument advanced for not providing enforceability of 'positive' rights is also somewhat misleading and more often than not overemphasised. Practically, enforcement of 'negative' rights is not all about mere abstention on the part of the government. Say for example, maintenance of law and order situation, which is central to create congenial atmosphere for enjoyment of 'negative' rights, requires government to incur as much or more resource than that required for enforcement of any 'positive' right.

South Africa had the luxury to take lessons from the constitutional experience of some other countries which find it difficult to strike a balance between 'positive' and 'negative' rights, in terms of their respective importance including enforceability. Exploiting this lessons to their full advantage and showing adherence to the indivisible nature of human rights, South Africa, that framed its constitution in 1996, resolved to put all the rights in the same part of the Constitution they named 'Bill of Rights'. But welfare rights like access to housing, health etc. are not made enforceable in the same way as other classical rights.

The provisions say that the state is under a duty to make these rights realisable through reasonable legislative and other measures, which must serve progressively to enhance access to these rights, bearing in mind the financial capacities of the state. Some would find it difficult to identify what advancement it did make over Bangladeshi position on socio-economic rights. The difference is subtle but fundamental and decisive. As would be seen in the instance given below, the position of South African constitution on socio-economic right brings the issue of availability of resources in fulfilling the rights within the boundary of judicial review. Stated simply, South African Constitutional Court is authorised to scrutinise whether the state has enough financial capacity and whether this capacity is used to its fullest. In Bangladesh we have left the issue totally at the mercy of political will of government.

Now let us see some of the fruits South African innovation has yielded so far. The judgment delivered in the famous Grootboom's case (2000) by the South African Constitutional Court sheds some light on the advancement that South African Bill of Rights may have made vis-à-vis our Fundamental Principles. In this case several hundred homeless people, occupying government land without any legal authority, were evicted leaving them roofless. They had section 26 and 28(1)(c) of the Constitution in their favour which gave them the right of access to adequate housing and afforded children the right to shelter respectively. But the problem was that neither of the sections entitled them to claim the implementation of the right to shelter immediately. Rather it was made dependent on the availability of governmental resources.

This delicate case put the perceived progressiveness of the South African Bill of Rights to serious test as the way letters of law to be applied in negotiating practical situations was to set the direction of South African Constitution so far it concerned implementation of socio-economic rights. In a unanimous judgment the Constitutional Court stressed that all the rights in the Bill of Rights were inter-related and mutually supporting as realisation of socio-economic rights were to enable people to enjoy the other rights enshrined in the Bill of Rights. Thus, human dignity, freedom and equality were denied to those without food, clothing or shelter. Then the Court ventured to evaluate some housing programmes already taken by the government, assessed their efficiency and gave some specific directions meant to ameliorate the conditions of the aggrieved petitioners.

It appears that the inclusion of socio-economic rights alongside 'classic' liberty rights already produced some benefits as this allowed the Constitutional Court to accord more importance on such socio-economic rights and intrude into the domain of governmental policy making and programme implementation in ensuring these rights. Though the Constitutional Court did not deny the Constitutional qualification of 'availability of resources' in implementation of socio-economic rights, it did assume the authority, which of course is a responsibility too, to investigate into the availability of resources and make directions, as they find appropriate on their findings of investigation, to the government. In other words, in appropriate circumstances, the Court can and must enforce governmental obligations of socio-economic nature.

South Africa has shown its maturity by taking lessons from the development of different nations' constitutional jurisprudence. Its Bill of Rights and Constitutional Court's response to that really marks a giant leap towards converting the country into a welfare state. Now it's our turn to take lessons that are being yielded by South African Constitutional development. We must remember that if the socio-economic rights remain underachieved, enforcement of civil-politico rights would just help the beneficiaries of a class-stratified and discrimination-ridden society to maintain a status-quo. So it is for the greater goal of bringing structural change and thus help the toiling masses to live more human-like lives, we should closely see and adapt South African experience to best suit our own situation.

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